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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ASHER C., a Minor

LAURIE W. et al.,

Petitioners and Respondents,

v.

JONATHAN C.,

Objector and Appellant.

F070100

(Super. Ct. No. S-1501-AT-3432)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. James L. Compton, Commissioner.

David M. Thompson, under appointment by the Court of Appeal, for Objector and Appellant.

The Law Offices of Edward J. Quirk, Jr., and Edward J. Quirk, Jr., for Petitioners and Respondents.

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Appellant Jonathan C. (father) appeals from a judgment¹ terminating his parental rights over his now 10-year-old son, Asher C. (Asher). The judgment frees Asher to be adopted by his legal guardians, respondents Laurie and Richard W. (collectively guardians), who had petitioned the court to terminate father's parental rights pursuant to Probate Code section 1516.5.² Section 1516.5 authorizes termination of parental rights for children in probate guardianships when the guardianship has continued for at least two years and the court finds adoption by the guardian would benefit the child.

Father contends section 1516.5 is unconstitutional as applied to him, therefore reversal is required because the trial court failed to find him an unfit parent before terminating his parental rights. In the alternative, father contends the trial court did not apply the correct standard of proof and substantial evidence does not support the trial court's finding of benefit. We agree there is an evidentiary void in the record on an important issue. Accordingly, we reverse the judgment and remand the matter for consideration of additional evidence.

FACTS

Asher was born in January 2005 to father and Amber A. (mother), an unmarried couple. Guardians are Asher's maternal grandmother and stepgrandfather. With father's consent, guardians were granted temporary guardianship over Asher on June 6, 2011, and full guardianship on August 16, 2011. Asher had lived with guardians since June 2011.

In 2011, father was convicted of two felony charges associated with his employment at a medical marijuana dispensary; he was incarcerated from July 8, 2011 to

¹ The appellate record does not contain any document titled "judgment." Instead, the notice of appeal is from the probate court's August 29, 2014, minute order, which granted the petition as prayed. In the interests of justice and to avoid delay, we exercise our discretion to deem the order an appealable final judgment. (*In re Clarissa H.* (2003) 105 Cal.App.4th 120, 122, fn. 2; see also *Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 20–21; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 112(d), p. 178.)

² All further statutory references are to the Probate Code unless otherwise stated.

October 16, 2013. During his incarceration, he had a number of visits and weekly telephone conversations with Asher until September 2013, when guardians stopped accepting father's calls. After father's release from prison, he unsuccessfully tried to call guardians and asked their pastor to intervene. He subsequently filed a petition for visitation; on January 13, 2014, father appeared in probate court to seek a guardianship visitation plan.

On February 21, 2014, when Asher was nine years old, guardians filed a petition to declare Asher free from parental custody and control pursuant to section 1516.5 (the termination petition).³ The termination petition alleged that it was in Asher's best interest to terminate parental rights because the parents did not have legal custody of Asher; Asher had been in guardians' physical custody for not less than two years; and Asher would benefit from being adopted by guardians. In the accompanying Declaration under the Uniform Child Custody Jurisdiction and Enforcement Act, guardians declared that Asher lived with mother at various addresses in Kern County from May 2006 to July 2009; from June 2009 to December 2010, Asher lived with mother in Pine Mountain Club, California; Asher lived with father in Bakersfield from December 2010 to June 2011; and Asher lived with them from June 2011 to the filing date of the termination petition.

The Investigator's Report

On April 4, 2014, a court investigator filed a report on the termination petition, in which the investigator recommended the petition be granted. Laurie explained to the investigator why she and Richard became Asher's guardians. She stated that father and

³ The petition also sought termination of parental rights on the grounds of abandonment pursuant to Family Code section 7822. That section allows for the adoption of a child who has been left in the care of another person for six months without provision for support, or without communication from his parents, with the intent on the part of the parents to abandon the child. (*Id.*, subd. (a)(2).) Guardians, however, dismissed the abandonment claim at trial, and proceeded solely under section 1516.5.

mother had a tumultuous relationship; they frequently would separate and get back together, while Asher was sent back and forth between his parents. According to Laurie, both father and mother had substance abuse issues. In December 2010, Asher was molested by a neighbor while in mother's care and father took custody of Asher.⁴ In May 2011, father contacted Laurie about keeping Asher, as both he and mother had been arrested and were facing incarceration. Father signed a consent for guardianship; mother reportedly was in agreement with the plan, although she opposed the guardianship in probate court.

Mother was given court-ordered visitation with Asher at guardians' discretion, but she did not attempt to comply with the structure; there were no visitation orders for father, presumably because he was incarcerated. Laurie tried to maintain contact with mother to facilitate visits, but stopped visits in August 2011 because they were upsetting to Asher. Mother stayed with Asher and guardians for 10 days in August 2013, after mother broke her back; this was the last time mother saw Asher.

Throughout 2012 and 2013, father telephoned Asher from prison, and in November and December 2012, Laurie took Asher to visit father in prison. From January to August 2013, Asher's paternal grandparents took Asher for four visits with father. During and after his incarceration, father reportedly sent Asher birthday and Christmas cards, as well as some gifts. Following father's release in October 2013, he contacted Laurie about seeing Asher. According to Laurie, she asked father to begin with supervised visits, but father refused, as he wanted unsupervised visitation. There had not been any visitation arranged since father's release. Guardians were pursuing the termination petition as a step in filing for adoption of Asher.

⁴ Laurie believed Asher was molested. The sheriff's department was called and Asher was interviewed in October 2011. Laurie also was questioned. Laurie did not know if the investigation had been completed.

Asher was in the third grade and doing very well in school. He was active in soccer, karate and church activities. The investigator interviewed Asher, who seemed to have a limited understanding of the purpose and consequences of the termination petition, which was appropriate for a child his age. Asher was in favor of being adopted by guardians, who he called “Mom” and “Dad.” Asher described his present home as “fun” and “safe,” and wanted to remain living there. When asked about his life before he lived with guardians, Asher said it was “kind of scary. I never knew what was going to happen.” Asher described his parents as “having problems,” and “I remember worrying about how a little kid like me was going to fix them.”

Father had contacted the investigator in response to a certified letter sent to him regarding the termination petition, and stated he was going to contest it. Father told the investigator that in 2011, he and mother agreed that Laurie was the best choice to care for Asher due to their legal problems, and since he expected to be incarcerated for some time, he signed the consent for guardianship. Father had not seen Asher since August 2013, but stated: “I maintained contact with Asher the entire time I was incarcerated. I completed a parenting program offered by the prison. I know that I need to do things different now.” Father explained that guardians would consent to his seeing Asher only with one of them present, which he felt would hinder his ability to form a relationship with Asher. In January 2014, father filed a petition to obtain guardianship visitation orders, but guardians subsequently filed the termination petition. The investigator attempted to contact mother, but she did not respond.

The investigator reviewed the standards set forth in section 1516.5 for declaring Asher free from his parents’ custody and control, and believed they had been satisfied. Guardians had been Asher’s primary parental figures and caretakers since Asher came to live with them in June 2011. The investigator did not believe the possible benefit Asher could receive from beginning a parent/child relationship with either parent outweighed the benefit from terminating parental rights and making adoption the plan, noting that

during the time they were directly involved in Asher's care, neither parent maintained a safe and stable environment. The investigator was impressed with Asher's awareness that he was in a chaotic environment when he was in his parents' care, and questioned whether either parent had a parent/child relationship with Asher, since Asher expressed a sense of sometimes trying to survive and other times trying to care for his parents. It appeared to the investigator that Asher was thriving in guardians' home, was well bonded to them, and understood that in his present home, he was the child and the parental figures were there to protect him, provide structure and to act in his best interest. Accordingly, the investigator believed the best interest standard of section 1516.5 for termination of parental rights had been satisfied.

Father's Opposition

Father, through his attorney, filed a written opposition to the petition, in which he argued that section 1516.5 was unconstitutional as applied to him. Father contended that it would be a miscarriage of justice, and in violation of his and Asher's constitutional rights, to find it was in Asher's best interest to terminate parental rights absent a showing of father's unfitness as a parent. He asserted that, upon his release from prison, he demonstrated a prompt attempt to assume his parental responsibilities. He quoted letters he received from Laurie while he was incarcerated, which he asserted indicated she believed he and Asher had a strong bond.⁵ Father asserted that he had not been shown to be unfit and a continued relationship would be beneficial to Asher, and asked the court to deny the petition.

⁵ In his opening brief on appeal, father cites to facts and quotes from documents that were included in his opposition, but on which no evidence was offered at trial. These include: (1) complimentary quotes from Laurie's letters to him; (2) an assertion that father moved into a three bedroom, two bath home on March 30, 2014; and (3) the circumstances of father's arrest and conviction, namely that he was incarcerated for conspiracy to distribute, and possess with the intent to distribute, marijuana, which resulted from his employment at a medical marijuana dispensary that was operating pursuant to California law but which violated federal law.

The Trial

Trial on the petition was held on August 29, 2014. Both Laurie and Richard testified on their behalf, while father, who was present and represented by counsel, testified on his own behalf.

The Guardians' Testimony

Laurie testified that when Asher came to live with them, he needed "quite a bit" of special care, including mental health care. Asher acted out and was having "incidences at school" that required Laurie to meet with school officials, including his teachers, the dean of students, the principal, and the "child psych therapist."

Asher had been seeing a therapist for most of the three years he had been living with guardians; he had not been going to therapy that summer and there was a break of several months where he was okay. The therapist assisted guardians with setting up structure for Asher, which included giving Asher household duties for which he was paid, and guided them on how to set boundaries for him. To help address Asher's behaviors, guardians spent a period of time talking to him every night about proper touches. Asher had been given a diagnosis, which guardians were working on addressing. Asher loved school and had just been accepted into the GATE program. His grade point average had improved from 3.0 in first grade to 3.75 in third grade.

Guardians filed for guardianship because mother was addicted to drugs, unemployed, and did not have a stable place to live. Laurie had to go to the emergency room many times because mother was there. There were times Laurie had to care for Asher because mother could not. In 2010, mother and Asher were living at guardians' house. In the year before filing the guardianship petition, Richard had seen Asher at mother's house in Pine Mountain, at father's residence, and at the paternal grandparents' home. At the time, father lived in a house with male roommates; Richard did not feel father's living conditions at that time were appropriate for Asher.

When guardians filed for guardianship, neither parent was living in guardians' home. Since 2011, guardians had provided Asher with a home and provided for his care. They put Asher on their health insurance plan, and they were responsible for taking Asher to his medical appointments and providing for his health care needs. Asher's baby teeth had rotted down through his gums into his permanent teeth, which required many appointments, pulled teeth and thousands of dollars. Asher, who was under an allergist's care, had special dietary needs due to food allergies. Guardians carried an EpiPen and inhaler in case he had an episode. Asher had his own room in guardians' home, which is located in an adult-only, over-55, community. Guardians had permission from the community's board of directors for Asher to live there. Guardians were able to provide for Asher financially.

Laurie believed Asher's placement with guardians had benefited him "very much," as he was "very happy," he was thriving in school and in after-school activities, he loved going to church, he was outgoing, and he loved guardians. Asher asked if he could call them mom and dad. Richard had seen changes in Asher's behavior since 2011; he was "a healthier, happier, more protected child." If parental rights were terminated, guardians, who had been married for about four years, intended to adopt Asher. They both believed it was in Asher's best interest to terminate father's parental rights.

During father's incarceration, Laurie facilitated contact between him and Asher, and allowed telephone calls. The calls, which father had to initiate from the prison, took place nearly weekly for the first two years, but during the last year, "not so much" and "[t]owards the end, no." Laurie had taken Asher to visit father in prison twice. She also allowed the paternal grandmother, Mary Ann, to take Asher to visit father in prison less than a dozen times.⁶ When asked if there were any problems after Asher visited father,

⁶ Guardians also allowed Asher to visit Mary Ann. Unsupervised visits stopped in 2012, and Mary Ann no longer had permission to take Asher to see father, after Mary Ann told Laurie she had been arrested. Thereafter, guardians allowed Asher and Mary Ann to visit in their presence. After Mary Ann provided guardians with proof that her

Laurie testified “most definitely.” She allowed visits to continue, however, because she believed father had changed and was trying to be a good father. She was trying to facilitate and support their relationship. Laurie estimated that during father’s incarceration, Asher and father had communicated through phone calls and visits a total of 30 to 35 hours.

In September 2012, father sent mother a letter in which he told her he wanted them to go to court to get Asher back. Father stated he would have to get a lawyer to fight for their son, prove that what Laurie had been doing the past two years was wrong, and to show the judge how much she had made Asher suffer. Laurie was concerned about the letter, but it was not her main concern, which was Asher’s welfare.

Laurie had written father a number of times during his incarceration to say she supported him and he was a good father. She made those statements because she thought at the time it was in Asher’s best interest to have an ongoing relationship with father. She changed her mind around August 2013 for several reasons: (1) Asher told Laurie, at the encouragement of his therapist, that he had anxieties about being with father; (2) father dismissed Laurie when she discussed Asher’s molestation with father; (3) Laurie was concerned that if Asher and father reunified, Asher would be put in a “similar circumstance”; and (4) father might reoffend, put Asher in an unsafe environment, or have Mary Ann, who was a felon, supervise Asher. Thereafter, Laurie told Mary Ann she would not allow Asher to visit father until they could visit in a therapist’s presence because Asher “had anxiety and fears about things.” Asher was beginning to have problems in school again. According to Richard, when Asher is anxious, he becomes very hyperactive and is easily agitated. Asher exhibited these behaviors when they

court case had been resolved and she had a clean drug test, guardians allowed longer visits. Once trust was rebuilt, guardians allowed Mary Ann to take Asher to see father in prison.

returned from prison visits; they accelerated dramatically as the time for father's release neared, which required Asher to see his therapist more frequently.

Guardians sent father a letter on September 7, 2013, in which they stated their concerns. They told father their expectations for him and what it would take to re-engage in Asher's life, which were based on conversations with Asher's therapist and Richard's professional background.⁷ These required father to: (1) educate himself about Asher's diagnosis, its ramifications and associated behaviors, and how those behaviors could be remediated, made worse, or improved; (2) engage in counseling because Asher was very anxious and upset, which was evidenced in his behavior at school; and (3) recognize that Asher needed therapeutic help in the transition process, which could be provided by either Asher's current therapist or another therapist of father's choosing. They also offered father the free services of a friend of theirs, who had worked as a social worker for "CPS" for nine years, to help in the process. Father did not reply to or answer their letter. He did not meet any of these expectations or provide verification that he had done so.

After father's release from prison, Laurie received a couple of text messages from father in October about visiting Asher. After father filed his visitation petition, guardians tried to work out a visitation schedule with father; they wanted visitation to begin in a therapeutic setting, but father rejected that offer. According to Laurie, the decision to file the termination petition was a "growing decision" that ultimately was made on the date she signed the petition, February 14, 2014, which was the date they were in probate court on father's visitation petition. Richard had concluded the termination petition was necessary when father did not respond to, or act on, the suggestions laid out in the September 2013 letter.

⁷ Guardians are retired. Laurie had worked as a professor's assistant while Richard had been a college professor.

Once the termination petition was filed, the guardianship action was stayed. Laurie did not think she understood at the time that filing the termination petition would prevent father from visiting Asher until the termination petition was determined, and that was not her motivation, while Richard assumed that would be the effect of filing the termination petition. Between father's release from prison and February 2014, father did not see Asher.

Father's Testimony

Father testified he was incarcerated in federal prison on July 8, 2011, for working at a medical marijuana dispensary. He was imprisoned in Phoenix for the first 11 months, and then transferred to Lompoc, where he remained for 14 months until his release on October 16, 2013. While in prison at Phoenix and Lompoc, father spoke with Asher over the telephone every Friday at 6:00 p.m. for about 15 minutes. Father placed the calls to Laurie's cell phone. While in custody at Lompoc, guardians brought Asher to visit him twice. Mary Ann also brought Asher to visit him every three weeks. In father's opinion, Asher did not seem to be apprehensive or scared of him during visits. They talked about God, and about their plans when father got out, such as what they were going to do and what Asher wanted to do with father. Father described Asher's demeanor as "[n]ormal, loving Asher." Father estimated that he had spoken with and seen Asher while in custody a total of 30 to 40 hours.

Father and guardians exchanged letters while he was in custody in Lompoc. Guardians were supportive of his being a father to Asher and indicated he was a good father. Their letters referenced what would happen when he got out of custody.

Guardians stopped answering father's telephone calls after September 15, 2013. According to father, guardians did not tell him why they would not allow telephone contact with Asher. Father acknowledged receiving guardians' September 2013 letter, which set forth their expectations and wanted him to agree to certain conditions, which included reunification guidelines from the court and guardians. After receiving the letter,

he attempted to contact guardians every Friday at 6:00 p.m., but there was no answer, so he never got a chance to discuss the letter with them. He was unable to leave a voice message from prison. He did not write a letter to guardians because he thought it would be better to talk over the phone and he was “a little upset.” Before receiving this letter, father told guardians he would do anything he had to for his son.

After his release, father called guardians three to five times, but they did not answer the phone. He also sent a text message, but received no response. He did not text a response to their letter because he wanted to talk to them in person. The first Sunday after his release, father contacted the pastor at guardians’ church to get the pastor’s assistance with visitation. He told the pastor he would comply with guardians’ expectations. Guardians never contacted him to arrange visitation and never told him why they ended his contact with Asher.

Father never told guardians he would not comply with their expectations; he was willing to have restrictions imposed and just wanted to see Asher. Father did not do any of the things set forth in guardians’ letter because he could not, as he had no communication with guardians. He did not go to counseling because he thought he was supposed to attend with Asher. Father could not afford guardians’ counselor, so he was going to figure out another one. Father, however, did not attempt to find another counselor, or try to meet with Asher and his current therapist. The only thing he did before filing the visitation petition, other than attempting to call guardians, was to talk to their pastor.

Father contacted an attorney, who filed papers on his behalf in probate court requesting visitation. They had been to court a few times on his request at the end of 2013 and beginning of 2014, when father was served with the termination petition in February. He understood that thereafter visitation was not going to happen.

Asher lived with father from January 2011 to July 8, 2011, when father was placed in custody; during that time, father made sure Asher went to school every day. They rode

their bikes to school. Father said they had a good relationship and “[i]t was awesome.” Before January 2011, father had weekend visits with Asher from Friday after school to Monday morning. The last time father lived with mother was in 2009. Father got custody of Asher in January 2011 because Asher had been absent from school 17 days.

Father was not aware that Asher was having emotional issues before father had custody in 2011; Asher did not seem to cry and appeared happy. Father admitted, however, that Asher had some behavior problems at school the first few months he lived with father, specifically fighting, for which he had been disciplined at school. Father also punished Asher by putting him in his room and making him work hard on his handwriting, and enrolled Asher in Jujitsu. He did not take Asher to counseling because he did not have any income or insurance. Father looked into counseling at the welfare office, but did not call any therapists to see how much they charged.

According to father, when he consented to the guardianship, he agreed with Laurie and Richard that they and the paternal grandparents would share guardianship so Laurie and Richard would not bear 100 percent of the load. At that time, he did not know he was going to be sentenced to prison; he did not find that out until July 26, 2011.

When he was released from prison, father was required to live in a halfway house, where he stayed until November 15, 2013. At the time of the trial, father was still on probation and subject to random drug testing. He denied current use of illegal drugs or that he drank alcohol; the last time he used illegal drugs was May 3, 2010, and while he used to drink alcohol, he consumed “very little” of it. Father was employed as a facility technician at an environmental services company, where he was subject to random drug testing. He had never submitted a positive test.

When father was in custody, he took “every step” to better himself. He took every drug class offered, as well as parenting classes at both prisons. Father, who was 35 years old, was living in Bakersfield with his girlfriend, who worked as a dental assistant. They had been dating since November 2013. Other than his 2011 conviction for two felonies,

he had a 2005 misdemeanor conviction for marijuana (for which he served 72 days in jail), as well as other misdemeanors related to marijuana. He worked in the medical marijuana dispensary even though he had a history with marijuana.

Father claimed he did not find out that Asher had been molested until 2012, after he was incarcerated. Guardians told him in a telephone conversation that Asher had an issue that they wanted to talk to him about in person; Richard and father talked about the situation and what the therapist and Asher said. Father denied ever telling Laurie that he took custody of Asher due to the molestation allegation.

Father was asking the court to let him into his son's life. He understood that even if the guardians' petition was denied, he would not have custody of Asher and the next step would be to establish visitation. Father wanted to see Asher. He loved his son "to death" and believed Asher loved him. Father did not have a relationship with mother; they had not spoken since he had been served with the termination papers.

Father did not have any concerns about Asher being cared for by guardians "[f]or the most part." Guardians kept him informed of what was going on with Asher, including that Asher was seeing a therapist and the issues pertaining to the molestation. They also shared with him issues that arose in counseling relating to Asher's custodial time with mother. While father was concerned, he could not remember what guardians told him because it was back in late 2011 and early 2012. Guardians did not tell him about Asher's anxiety issues until September 2013 and did not share Asher's diagnosis with him. Father did not believe Asher's issues had been resolved and understood there could be recurring issues.

Father admitted writing the September 15, 2012, letter to mother, in which he stated that what Laurie had been doing "was wrong" and she had "made Asher suffer." Father explained that at that time, he believed Asher was suffering because he did not interact with other children, as he was living in an older community and there were no kids to play with. His opinion changed a couple months later, after mother wrote him and

let him know her state of mind. He believed mother had given him false information. Father was concerned about Asher being a kid, and other than their not letting him be in Asher's life, he believed they were doing a good job with Asher.

Closing Arguments and Trial Court's Decision

In closing arguments, guardians' attorney asked the trial court to declare Asher free from the custody and control of his biological parents under section 1516.5, as it was in Asher's best interest to be with guardians. Father's counsel argued the petition should be denied because there was no allegation of wrongdoing on his part during the two years before the petition was filed, and there was not clear and convincing evidence that his parental rights should be terminated. Asher's court-appointed counsel asked the trial court to consider the investigator's report and follow his recommendations, asserting there did not have to be any showing of wrongdoing on father's part in order to terminate rights under section 1516.5.

In its oral ruling from the bench, the trial court noted that mother did not contest the petition, found that, with regard to her, the provisions of section 1516.5 had been met, and terminated her parental rights. As to father, the trial court found the three factors under section 1516.5 had been met, namely that the parents did not have legal custody, Asher had been in guardians' physical custody for at least two years, and Asher would benefit from being adopted by guardians. In making these findings, the trial court explained that while it believed there had been a relationship between father and Asher, that relationship had weakened considerably, not for father's lack of trying but due to the difficulties his incarceration presented. Weighing that relationship against Asher's best interest in having stability and not being uprooted from his current life, where he was starting to thrive and improve, the trial court found it would be in Asher's best interest to grant the termination petition. After considering the testimony, the recommendation of Asher's counsel, and the investigator's report, the trial court believed Asher saw

guardians as his family and “probably as his parents,” and that they offered stability Asher did not have until they stepped into his life.

After the trial court’s ruling, guardians’ counsel stated she would prepare the order. On September 11, 2014, apparently before an order was submitted, father filed a notice of appeal from the August 29, 2014, order.

DISCUSSION

Father contends the trial court erred when it granted guardians’ petition and terminated his parental rights. He argues several grounds for reversing the judgment. First, he asserts that section 1516.5 is unconstitutional as applied to him, therefore the trial court was required to find he was unfit before terminating his parental rights and its failure to make such a finding requires reversal. He alternatively asserts that the trial court did not apply the correct standard of proof and substantial evidence does not support the trial court’s finding that adoption by guardians would benefit Asher. As we explain below, we agree the matter must be remanded for consideration of additional evidence, and therefore, we do not decide the other issues father raises.

Probate Guardianship

A probate guardianship is a private custody arrangement, approved but not supervised by the court; it is distinct from a guardianship ordered as a result of juvenile dependency proceedings. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1133 (*Ann S.*)). Probate guardianships provide an alternative placement for children who cannot safely remain with their parents. (*Id.* at p. 1122.) “It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought under section 1516.5.” (*Ibid.*)

When the court appoints a guardian, the parent’s authority ceases. (*Ann S.*, *supra*, 45 Cal.4th at p. 1123.) While the court has discretion to grant visitation, parental rights otherwise are completely suspended for the duration of the probate guardianship and the

guardian assumes the care, custody and control of the child. (*Id.* at pp. 1123–1124.) Unless ended by court order, the guardianship continues until the child either attains majority or dies. (*Id.* at p. 1124.) The court may terminate the guardianship on a petition by the guardian, parent, or child, based on the child’s best interest. (*Ibid.*)

Here, guardians petitioned to terminate the guardianship pursuant to section 1516.5, which allows a child in a probate guardianship to be declared free from parental custody and control if (1) the parents do not have legal custody of the child; (2) the child has been in the guardian’s physical custody for at least two years; and (3) the court finds that the child would benefit from being adopted by the guardian. (§ 1516.5, subd. (a).)

“ ‘Benefit’ in this context means that adoption would be the best alternative for the child ...[,]” and requires a determination of the child’s best interest. (*Ann S., supra*, 45 Cal.4th at p. 1128, fn. 10.) In making this determination, the court considers all factors relating to the child’s best interest, including but not limited to the nature and extent of the child’s relationship with his birth parents, his guardian and the guardian’s family, and any siblings or half siblings. (§ 1516.5, subd. (a).) Other relevant factors “include the circumstances leading to guardianship, the parent’s efforts to maintain contact with the child, any exigencies that might hamper those efforts, and other evidence of commitment to parental responsibilities. [Citation.]” (*Ann S., supra*, at p. 1132.) The guardian bears the burden of making the requisite showings under section 1516.5 by clear and convincing evidence. (See *Ann S., supra*, 45 Cal.4th at p. 1127.)

Our Supreme Court has held that section 1516.5 does not violate a parent’s substantive due process rights by authorizing termination of parental rights without a finding of parental unfitness, and therefore is facially constitutional. (*Ann S., supra*, 45 Cal.4th at p. 1128.) This is because, by that stage “the parent-child family unit has ceased to exist and the parent’s entitlement to custody is not at issue. It would be anomalous to require proof in every case, by clear and convincing evidence, that a mother or father who has had no custodial responsibilities for two or more years is currently an

unfit parent.” (*Id.* at p. 1135.) The Court, however, noted that the statute was open to constitutional challenge as applied to an individual parent. (*Ann S.*, *supra*, 45 Cal.4th at p. 1132; see also *In re Charlotte D.* (2009) 45 Cal.4th 1140, 1147–1149 (*Charlotte D.*).)

The Trial Court’s Benefit Finding

Father challenges the trial court’s finding that adoption by guardians would benefit Asher, arguing it is not supported by substantial evidence.

While the trial court’s ruling regarding the best interest of the child must be based on clear and convincing evidence (Fam. Code, § 7821), our role is limited to determining whether substantial evidence supports the conclusions reached by the trial court in utilizing that standard. (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1382.) On appeal, we indulge in all reasonable inferences to uphold the judgment. (*Ibid.*) “[W]e do not resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies. [Citation.] We merely determine if there is any substantial evidence, contradicted or not, which will support the conclusion of the trier of fact. [Citation.]” (*Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1539.)

As we have already stated, in determining whether Asher would benefit from adoption, the trial court was required to consider all factors relating to Asher’s best interest, including the circumstances that led to the guardianship, father’s efforts in maintaining contact with Asher, any exigencies that might have hampered his efforts, and other evidence of commitment to parental responsibilities. (*Ann S.*, *supra*, 45 Cal.4th at p. 1132.) The trial court must find that adoption is the best alternative for Asher, as “[i]t would be absurd for the trial court to conclude that *any* benefit from adoption would be sufficient, regardless of competing considerations....” (*Id.* at p. 1128, fn. 10, original italics.) Thus, the trial court was required to weigh the benefit of adoption with the guardians against the alternative of continued guardianship with paternal visitation.⁸

⁸ Citing to section 1516.5’s legislative history, father claims the statute was designed to apply to situations unlike his, such as where the parent is not likely to reclaim

The evidence here showed that Asher had a chaotic home life before coming to live with guardians – he lived primarily with mother, with father having weekend visits, although sometimes father lived with the Asher and mother. Father took custody of Asher full-time for six months after allegations of molestation by a neighbor surfaced while Asher lived with mother. When father knew he would be going to prison, he placed Asher in a good home with the maternal grandparents. While in prison, father kept in contact with Asher as much as possible through telephone and in-person visits, he also wrote Asher and sent him gifts. Guardians facilitated that contact because they believed father had changed and was trying to be a good father; they told him he was a good father in their letters to him because they believed it was in Asher’s best interest to have an ongoing relationship with father.

Nevertheless, as father’s release date neared, the guardians became concerned because Asher was expressing “anxiety and fears about things[,]” and Asher told Laurie, at his therapist’s urging, about “his anxieties about being with his dad.” Thereafter, guardians wrote father a list of expectations if visitation was to take place after father’s release. Although father did not respond to the letter in writing, he continued to seek to initiate visits with Asher. Guardians, however, would not take his calls, apparently because father would not accede to their demands, effectively cutting off all communication. After father filed his visitation petition, instead of trying work out a visitation plan, guardians filed this action seeking to terminate father’s parental rights.

In reviewing the record before the trial court, it is apparent that there is little evidence of the quality of father’s relationship with Asher. While there was evidence that

the child or where a drug-addicted mother places the child in guardianship hoping to rehabilitate herself, yet fails to do so. In determining statutory intent, however, we look first to the statute’s language, giving effect to its plain meaning. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 565.) Father does not contend the statute is ambiguous. Accordingly, we look only to the statute, which clearly requires the court to consider all factors relating to the best interest of the child in determining that the child would benefit from being adopted by his or her guardian. (§ 1516.5, subd. (a)(3).)

Asher had difficulty after prison visits and, as father's release date approached, became anxious about "being with father[,]" there is no evidence from which the trial court reasonably could infer that Asher's anxieties were more than a normal reaction to either visiting father in prison, or to father's impending release and the uncertainty that would engender. No expert testimony was presented about the quality of their relationship or that continued contact with father would be detrimental to Asher. Significantly, Asher's therapist did not testify about his therapy or her recommendations. Although Asher told the court investigator he wanted guardians to adopt him, and his life before coming to live with guardians was chaotic and caused him to assume a parental role, no evidence was presented that Asher was asked how he felt about his visits with father or how he would feel if he never saw father again.

What the evidence does show is that guardians had believed an ongoing father/son relationship was in Asher's best interest, but they and father came to an impasse on how to handle visits after father's release from prison. When father was unwilling to comply with their demands, they petitioned to terminate his parental rights. Given all of the circumstances, the evidence failed to satisfy guardians' burden of showing that adoption was a better option than guardianship with continued parental involvement. This is because there simply was not enough evidence of father's relationship with Asher from which the trial court could compare the benefits of adoption to the benefits of guardianship with the possibility of visitation with father.

Pointing to Asher's life before the guardianship, guardians assert that it is not in Asher's best interest to return Asher to the chaotic life he had with his drug-abusing parents. But whether Asher should be returned to father's custody was not the issue before the trial court. Moreover, guardians did not present any evidence that father's circumstances at the time of the hearing would present such a danger to Asher. The only evidence of father's current circumstances came from father, who testified that he was not using drugs, his drug tests were negative, and he had a job.

Father does not dispute that Asher has benefited greatly from guardians' loving care and support, and that he has developed a positive emotional bond with them. On this record, we see no reason the guardianship should not continue, as guardians have done an exemplary job raising Asher and assuming a parental role. What troubles us is the lack of evidence on the issue of whether Asher would be harmed if all contact with father was cut off as a result of adoption. We thus remand this matter for evidence on and resolution of this important issue. While on remand, it ultimately may prove true that adoption is in Asher's best interest, we hesitate to affirm that conclusion on the current record.

Accordingly, the trial court is directed to receive additional evidence and determine whether the option of adoption outweighs continued guardianship with the possibility of visitation with father. Since we remand the matter for additional evidence on this issue, we do not address the other claims the parties raised, including whether section 1516.5 is unconstitutional as applied to father, whether the trial court applied the correct standard of review, and the effect of father's failure to request a statement of decision. In addition, we express no opinion on father's right to visitation or whether conditions should be placed on any visitation plan.

DISPOSITION

The judgment is reversed. The matter is remanded for the consideration of additional evidence consistent with this opinion. The parties shall bear their own costs.

POOCHIGIAN, J.

WE CONCUR:

KANE, Acting P.J.

PEÑA, J.